A

AMIR MUHAMMAD ILIA SYAHID INDRA ZAIN PUTRA & ANOR v. PUTERA HANG JEBAT MOHAMED JIN & ORS

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING J
[WRIT SUMMONS NO: BA-22NCVC-7-01-2019]
B 18 OCTOBER 2020

LAND LAW: *Power of attorney – Validity of – Disposal of property to third party pursuant to power of attorney – Whether power of attorney obtained through means of fraud – Whether instrument creating power of attorney complied with conditions*
C *laid down under s. 3(1)(a)(vi) of Powers of Attorney Act 1949 – Whether instrument executed before an advocate and solicitor – Whether solicitor bore eye-witness of writing of signature – Whether merely informing solicitor that signature executed by executant sufficient – Whether negated requirement of 'personal knowledge' – Whether rendered power of attorney invalid – Whether interest obtained by third*
D *party defeasible – National Land Code, s. 340(2)(b) & (3)*

LAND LAW: *Indefeasibility of title and interests – Fraud – Transfer form executed by power of attorney – Whether power of attorney obtained through means of fraud – Non-compliance with conditions laid down under s. 3(1)(a)(vi) of Powers of Attorney Act 1949 – Whether rendered power of attorney invalid – Whether interest*
E *obtained by third party defeasible – Whether third party holder of immediate registered title – Whether proviso to s. 340(3) of National Land Code applicable*

The plaintiffs and the first defendant were the children of the late Tan Sri Mohamed Jin Shamsuddin ('Tan Sri Jins'). Four years before his passing,
F Tan Sri Jins had purportedly executed a power of attorney ('impugned PA') dated 10 October 2013 irrevocably appointing the first defendant to be his attorney to, *inter alia*, sign and execute any contracts, conveyances, assignments, sales and transfers relating to his property. The plaintiffs alleged that the first defendant had used the impugned PA, obtained through the means of fraud, to dispose the property to the third defendant. The plaintiffs
G thus challenged the authenticity of the signature of the late Tan Sri Jins on the impugned PA, verily believing that the signature on the impugned PA was not of their late father or executed by their late father. The question of law raised for the court's determination was whether the impugned PA, which was duly executed by the late Tan Sri Jins on 9 October 2013 and the
H execution of the same, having been admitted by the late Tan Sri Jins to the second defendant, the solicitor, and the act of putting a pen and marking on his signature in the impugned PA by the late Tan Sri Jins on 10 October 2013, was deemed as an attestation in accordance with the law, particularly under s. 3(1)(a)(vi) of the Powers of Attorney Act 1949 ('the Act').

I

Held (allowing plaintiffs' claims):

(1) Section 3(1)(a) of the Act provides for the conditions for an instrument to create the power of attorney, one of which is that the instrument is required to be executed before a person from those categories of persons mentioned in (i) to (vii) in s. 3(1)(a) of the Act. In the present case, the relevant subsection is item (vi), *ie*, an advocate and solicitor. The operative words that clearly set down the condition are '… the instrument is executed before, …'. The reading of the operative words, without the aid of any extrinsic material, simply connotes a situation that the donor has to execute the instrument before an advocate and solicitor. The nuance of the phrase 'is executed before' is that the solicitor whom the execution is made before him bears actual eye-witness of the writing of the signature by the donor. This proposition is bolstered by the contents of Form I of the First Schedule. (paras 13-15)

(2) The purpose of the authentication form is to allow the person who bears the actual eye-witness of the signature of the donor to state that the signature on the instrument is the signature of the donor himself, and no one else. The golden rule is 'that the words of a statute must *prima facie* be given their ordinary meaning'. The conditions set out in s. 3 of the Act are mandatory in law and therefore, if a power of attorney falls short of complying with any of the conditions stated in s. 3, the instrument will be invalid and unenforceable, *albeit* its registration in accordance with s. 4 of the Act. (paras 19 & 21-23)

(3) The second defendant, the solicitor who executed the authentication form, could not claim that the donor had admitted to him that the signature in the impugned PA was his by relying on s. 70 of the EA. Under s. 70 of the EA, only the person who executed the document could provide the admission, not the person who supposedly witnessed the execution of that person or other persons who were present. Therefore, the reliance placed by the second defendant on s. 70 of the EA was totally misplaced. (paras 44-46)

(4) The third defendant submitted that the gesture of mark by the late Tan Sri Jins next to his signature, which had been executed a day earlier, was sufficient to be construed as executed before the solicitor under the law. The making of a mark could be accepted as signed by an executant or the signature of an executant under the law. However, on the peculiar facts of this case, the pre-signed signature was not executed before the second defendant. Technically, flowing from this submission, the authentication form would be defective as it did not state clearly which signature the second defendant was authenticating. The argument that the mark was part of the pre-signed signature was flawed. It is impermissible to authenticate an executant's signature in part, but miss the earlier part for a gap of a day. (paras 50 & 52-54)

(5) Further, the phrase '… to my personal knowledge …' in the authentication form refers to the fact that the signature is executed in the presence of the person authenticating it. In the instant case, the signature was not executed in the presence of the second defendant. The mere fact that the executant told the second defendant that the signature was his could not give rise to a personal knowledge *vis-à-vis* experience through eye-witness of the signing of the executant's signature. Hence, the second defendant could not have had personal knowledge of the executant's signature since the second defendant did not see the signing of the signature. The part '… according to information given to him by a trustworthy and respectable person …' refers to information given by a third party, not the executant himself/herself. In the circumstances, the impugned PA, which was intended to create the power of attorney therein, had fallen short of complying with s. 3(1)(a)(vi) of the Act. Therefore, the question of law posed was answered in the negative. (paras 56-58 & 61)

(6) In view of the finding that the executant of the impugned PA did not execute the instrument before the second defendant, the impugned PA could not have validly created the power stated therein. It then followed that the attorney did not have the powers stated in the impugned PA. The impugned PA was, therefore, an instrument which was invalid in law to enable the first defendant to act for the late Tan Sri Jins. The transfer form which was executed by the first defendant as the holder of the invalid power of attorney could not constitute a valid instrument of transfer. Hence, the third defendant's interest as a registered proprietor could be defeated under s. 340(2)(b) of the National Land Code ('NLC'). (paras 62 & 63)

(7) The third defendant was the holder of the immediate registered title or interest of the property and therefore, the proviso in s. 340(3) of the NLC, *vis-à-vis*, a purchaser in good faith, could not lend a hand to the third defendant to claim good title to the property. The proviso to the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. The third defendant did not fall under the category of a subsequent transferee. Hence, the transfer of the property to the third defendant was liable to be set aside because the registration was premised on an insufficient instrument in law, *ie*, the transfer form executed by an attorney who was appointed under an invalid PA. (para 65)

Case(s) referred to:
Chin Jhin Thien & Anor v. Chin Huat Yean & Anor [2020] 7 CLJ 137 FC ***(dist)***
Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal [2017] 1 LNS 2086 CA ***(dist)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Sim Kim Ong v. Goh Phaik Sooi [1975] 1 LNS 162 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 68, 70
Interpretation Acts 1948 and 1967, s. 3
National Land Code, s. 340(2)(b), (3)
Powers of Attorney Act 1949, ss. 3(1)(a)(i), (ii), (iii), (iv), (v), (vi), (vii), (b), 4, First Schedule Form I
Rules of Court 2012, O. 14A

Other source(s) referred to:
Sarkar Law of Evidence, Malaysia Edition, Vol II, p 1951

For the plaintiffs - Mohd Iskandar & Nursyahirah; M/s Basharuddin Iskandar
For the 1st defendant - Nur Aini Atiqah; M/s Bahari & Bahari
For the 2nd defendant - Nurul Hadi; M/s Adnan Sharida & Assocs
For the 3rd defendant - Abdul Razak; M/s Abdul Razak & Partners

Reported by S Barathi

JUDGMENT

Choo Kah Sing J:

Introduction

[1] The plaintiffs alleged that the first defendant had used a power of attorney dated 10 October 2013 (hereafter "the impugned PA") to dispose a property known as GM 63, Lot No. 1045, Batu 7 ½, Kampong Pasir, Daerah Gombak, State of Selangor (hereafter "the said property") to the third defendant, and that the impugned PA was obtained through the means of fraud which was committed by the first defendant.

[2] The trial started on 23 July 2020. After two plaintiffs' witnesses had given their respective testimonies, counsels for the parties sought the indulgence of this court to allow the case to be summarily disposed pursuant to O. 14A of the Rules of Court 2012 by way of answering a question of law.

[3] With the consent of the parties' counsels, this court framed the question of law for the parties to address. The question of law is as follows:

> Whether the Power of Attorney dated 10.10.2013 which was duly executed by Mohamed Jin bin Shamsuddin on 9.10.2013 and the execution of the same having been admitted by Mohamed Jin bin Shamsuddin to the Second Defendant (the Solicitor) and the act of

putting a pen and marking on his signature in the said Power of Attorney by Mohamed Jin bin Shamsuddin on 10.10.2013 is deemed as an attestation in accordance with the law, particularly under section 3(1)(a)(vi) of the Power of Attorney Act, 1949?

Brief Facts

[4] The plaintiffs and the first defendant are the children of the late Tan Sri Mohamed Jin bin Shamsuddin who had passed away on 1 March 2017. The late Tan Sri Mohamed Jin was popularly known as "Jins Shamsuddin" by the locals. He was remembered as an iconic local movie actor who played the character Jefri Zain, a James Bond-like spy character, in the 1960s. In the latter part of his life, he was appointed as a Senator to the Dewan Negara for two terms.

[5] Four years before the passing of the late Tan Sri Mohamed Jin in 2017, Tan Sri Mohamed Jin had purportedly executed the impugned PA dated 10 October 2013 (see ikatan dokumen defendan kedua (exh. B5), pp. 5 to 8). In the impugned PA, the late Tan Sri Mohamed Jin had irrevocably appointed the first defendant to be his attorney to, *inter alia*, sign and execute any contracts, conveyances, assignments, sales and transfers relating to the said property. The impugned PA also states that upon the sale transfer and/or disposal of the said property, the late Tan Sri Mohamed Jin relinquishes his beneficial ownership of the said property and also his entitlement to the proceeds of sale. Further, his attorney could deal and distribute the proceeds in any manner whatsoever without accounting to him.

[6] Premised on the impugned PA, the first defendant entered into a sale and purchase agreement dated 17 October 2014 with the third defendant to sell the said property to the third defendant for a consideration sum of RM2,750,000. The first defendant executed the memorandum of transfer for the said property as transferor in the capacity as attorney of Tan Sri Mohamed Jin.

[7] The plaintiffs, upon having discovered the said property had been disposed and transferred by the first defendant using the impugned PA, queried the legality of the impugned PA. The plaintiffs challenged the authenticity of the signature of the late Tan Sri Mohamed Jin on the impugned PA. The plaintiffs verily believed that the signature on the impugned PA was not of their late father or executed by their late father. It is against this backdrop that the plaintiffs have initiated this action against the defendants.

[8] Before the close of the plaintiffs' case, the counsel for the plaintiff highlighted to this court that the second defendant, who was the solicitor who attested the impugned PA, admitted in his witness statement that he did not witness the signing of the signature by the late Tan Sri Mohamed Jin on 9 October 2013.

[9] The second defendant stated in his witness statement that the late Tan Sri Mohamed Jin had signed the impugned PA a day before he attested the impugned PA on 10 October 2013. This fact is corroborated by the witness statement of Encik Luqman bin Mazlan, the second witness who was to be called to give evidence for the second defendant's case.

[10] All the defendants' counsels agreed and admitted that Tan Sri Mohamed Jin had signed the impugned PA on 9 October 2013 before the second defendant attested the impugned PA on 10 October 2013 as a fact, although the two witness statements have yet to be tendered in court as testimonies and evidence.

[11] Based on the above undisputed fact, ie, that the second defendant, who was the attesting solicitor, was not present when the late Tan Sri Mohamed Jin purportedly placed his signature on the impugned PA on 9 October 2013, the counsels for the parties agreed to raise just one issue to be tried which is on the validity of the impugned PA. The parties' counsels agreed the issues that were agreed earlier to be tried were no longer relevant and parties had abandoned them. Likewise, all the allegations and purported claims in the pleadings of the parties were abandoned by the parties. Hence, the question of law that was framed is based on the agreed undisputed fact.

The Judgment

[12] Section 3 of the Powers of Attorney Act 1949 (Revised 1990), (Act 424), (hereafter "the Act") states as follows:

Authentication of powers of attorney

(1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia **unless**:

(a) if executed within Peninsular Malaysia, **the instrument is executed before,** and is authenticated in the appropriate form set out in the First Schedule hereto by:

(i) a Magistrate;

(ii) a Justice of the Peace;

(iii) a Land Administrator;

(iv) a Notary Public;

(v) a Commissioner for Oaths;

(vi) **an advocate and solicitor**; or

(vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia; or

A (b) if executed outside Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by:

(i) a Notary Public;

(ii) a Commissioner for Oaths;

B (iii) any Judge;

(iv) a Magistrate;

(v) a British Consul or Vice-Consul;

(vi) a representative of Her Britanic Majesty;

C (vii) on and after Merdeka Day, any Consular Officer of Malaysia;

(viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or

D (ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.

E (2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such

F written law. (emphasis added)

[13] The plain reading of s. 3(1)(a) of the Act proffers that there are conditions to be met in order for an instrument to create such power of attorney. One of the glaring conditions is that the instrument is required to be executed before a person from those category of persons mentioned in

G (i) to (vii) in s. 3(1)(a) of the Act. In the present case, the relevant sub-section is item (vi), ie, an advocate and solicitor.

[14] The operative words that clearly set down the condition are "… the instrument is executed before, …". The reading of the operative words, without aid of any extrinsic material, simply connotes a situation that the

H donor has to execute the instrument before an advocate and solicitor.

[15] The word "before" in the section is used to mean "in front of", in other words, in the presence of an advocate and solicitor. The nuance of the phrase "is executed before" is that the solicitor whom the execution is made

I before him bears actual eye-witness of the writing of the signature by the donor. This proposition is bolstered by the contents of Form I of the First

Schedule. The solicitor before whom the execution is made is required in law to execute the authentication form as per Form I of the First Schedule. This is the second condition.

[16] Form I of the First Schedule is reproduced as below.

FIRST SCHEDULE
[Section 3]
FORM I

FORM OF AUTHENTICATION IN CASE OF A POWER OF ATTORNEY EXECUTED BY AN INDIVIDUAL

I … (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official or Advocate and Solicitor of the High Court in Malaya) officiating [or practising] at …, **hereby certify that the signature of the signature thumb-mark of the donor above named was written affixed in my presence** on this … day of … 20 ..., and is, to my own personal knowledge, [or according to information given to me by trustworthy and respectable persons, namely … of …. and … of …, which information verily believe,] the true signature thumb-mark of … who has acknowledged to me that he is not is of full age and that he has voluntarily executed this instrument.

Witness my hand …

[17] Line four begins with "… hereby certify that the signature of the signature thumb-mark of the donor above named was written affixed in my presence …". It states clearly that the donor writes his signature in the presence of the solicitor (in the present case) who would later attest the authentication form and attach it with the instrument.

[18] The meaning of "in my presence" could not be stated any clearer to mean that – the person (in this case the solicitor) must be at the same time and same place as that of the other person (the donor), and at such close proximity to see the other person writing his signature or affixing his thumb-mark.

[19] The purpose of the authentication form is to allow the person who bears the actual eye-witness of the signature of the donor to state that the signature on the instrument is the signature of the donor himself, and no one else.

[20] The grammatical and ordinary sense of the words in s. 3(1)(a)(vi) read together with the contents of Form I of the First Schedule are clear and do not give raise to any inconsistency with the rest of the section.

[21] The wording in s. 3 of the Act used by the draftsman to convey what Parliament meant to say is in clear, unambiguous and unequivocal language. Hence, the golden rule is "that the words of a statute must *prima facie* be given their ordinary meaning" (see *Sim Kim Ong v. Goh Phaik Sooi* [1975] 1 LNS 162; [1976] 1 MLJ 232).

[22] In *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, FC, the Federal Court held in the absence of an authentication form in an impugned power of attorney rendered the instrument invalid in law for want of compliance with s. 3 of the Act. Hence, the conditions set out in s. 3 of the Act are mandatory in law.

[23] If a power of attorney falls short of complying with any of the conditions stated in s. 3, the instrument will be invalid and unenforceable, *albeit* its registration in accordance with s. 4 of the Act.

First Defendant's Submission

[24] In essence, the first defendant's counsel submitted that despite the fact that the donor did not execute the impugned PA in the presence of the second defendant (the solicitor), the donor had expressly acknowledged to the second defendant that he had written his signature on the impugned PA. The confirmation and acknowledgement of the donor that it was his signature on the impugned PA was sufficient to satisfy the meaning of "the instrument is executed before" the solicitor.

[25] The gist of the first defendant's counsel submission is summarised in para. 21 of his submission which states as follows:

> As such, the First Defendant humbly submits that the correct approach is not attestation of power of attorney but authentication of power of attorney.

[26] Following from the above paragraph, the first defendant's counsel cited the case *Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal* [2017] 1 LNS 2086; [2017] MLJU 2095, CA, in support of his submission.

[27] The first defendant's counsel reproduced para. 50 of the Court of Appeal judgment in his submission which states as follows:

> [50] In the instant case, there is no requirement for attestation under section 3 of the PAA 1949. The only requirement is authentication. Authentication *per se* may not attract section 68 of the EA 1950. A document can be authenticated in respect of an individual person even though the person did not sign the document in the presence of the witness. This is reflected in section 3 Form 1 of the First Schedule itself. That is to say, the law really does not require in strict terms for a signature to be witnessed by the relevant person, in person under the said Act. In the instant case, there is no issue on the signature of the signatories …

[28] Relying on the above proposition of the Court of Appeal, the first defendant's counsel submitted that the impugned PA was duly authenticated by the second defendant in compliance with s. 3 of the Act. Hence, although the late Tan Sri Mohamed Jin did not put his signature on the impugned PA

before the second defendant, this does not invalidate the impugned PA. The impugned PA remains valid by virtue of the authentication clause, the first defendant's counsel submitted.

[29] The first defendant's counsel relied on the wording in Form I of the First Schedule which states:

> … and is, to my own personal knowledge, [or according to information given to me by trustworthy and respectable persons, namely … of … and … of …, which information verily believe,] …

To submit that in authenticating the signature of the donor, the solicitor may have his own personal knowledge or have information which he verily believes is true of the true signature of the donor, and that this together with the donor having acknowledged that he is of full age and that he has voluntarily executed the impugned PA suffice to comply with s. 3 of the Act.

[30] The first defendant's solicitor emphasised that as long as the solicitor (in this case, the second defendant) has either personal knowledge of the signature of the donor or has information which he verily believes is true of the signature of the donor is sufficient to satisfy s. 3 of the Act. The emphasis is on the authentication, not on the donor placing his signature in the presence of the solicitor.

[31] The submission of the first defendant's counsel is rejected by this court. The Court of Appeal decision in *Kenanga Investment Bank Bhd* (*supra*), was based on s. 3(1)(b) of the Act, and the application of that section to the impugned PA in that case which was executed outside Peninsular Malaysia.

[32] There is a significant difference between powers of attorney executed within and without Peninsular Malaysia. For a power of attorney executed within Peninsular Malaysia, the instrument has to be executed before one of the persons listed in (i) to (vii) of s. 3(1)(a) of the Act, whereas, for a power of attorney executed outside Peninsular Malaysia, there is no such requirement that the instrument has to be executed before those persons listed in (i) to (ix) of s. 3(1)(b) of the Act.

[33] Section 3(1)(b) of the Act begins with the following statement:

> If executed outside Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar …

[34] Whereas, s. 3(1)(a) of the Act begins with the following statement:

> If executed within Peninsular Malaysia, **the instrument is executed before,** and is authenticated in the appropriate form set out in the First Schedule hereto … (emphasis added)

[35] The wording "… the instrument is executed before …" is clearly omitted in s. 3(1)(b) of the Act for a power of attorney which is executed outside Peninsular Malaysia.

[36] For a power of attorney that is executed outside Peninsular Malaysia, the requirement is that the signature has to be authenticated in such form as may be accepted by the Registrar. It is in this context that the Court of Appeal held "… there is no requirement for attestation under s. 3 of the PAA 1949. The only requirement is authentication …". The first defendant's counsel's submission that the legal proposition in *Kenanga Investment Bank Bhd* applies to the present facts of this case is seriously misconceived.

[37] The first defendant's counsel's submission in relation to the wording in Form 1 of the First Schedule in that the solicitor may have his own personal knowledge or have information which he verily believes is true of the signature of the donor, and that the donor has acknowledge to him that he is of full age and that he voluntarily executed the instrument is suffice to comply with s. 3 of the Act is also rejected by this court.

[38] Form I of the First Schedule has provided alternative wording for the person executing the authentication form. Undoubtedly, the alternative wording is meant for the situation as envisaged in s. 3(1)(b) of the Act. That is to say that the person executing the form could attest the signature of the donor according to information given to him which information he verily believed the true signature of the donor. This is in a case where the donor did not execute the instrument in his presence, as there is no requirement in s. 3(1)(b) of the Act that the donor has to execute the instrument before the person who executes the authentication form. It is in this context that alternative wording has been provided for in Form I.

[39] The alternative wording is not meant for a person executing the authentication form for an instrument that is executed within Peninsular Malaysia.

[40] The alternative wording in Form I of the First Schedule could not override the express condition in s. 3(1)(a) of the Act for the instrument to be "executed before" the persons who authenticated the signature.

Second Defendant's Submission

[41] In gist, the second defendant's counsel submitted that there are two "key elements" to be fulfilled in s. 3 of the Act, namely "executed before" and "authenticated by". In relation to the second element, the second defendant's counsel relied on the Federal Court decision in *Letchumanan Chettiar Alagappan* (*supra*) to state that the authentication requirement has been complied with. In response to this submission, this court is of the considered view that this is a non-starter. The pertinent question to address is the first element, ie, executed before.

[42] With regard to the element of "executed before", the second defendant's counsel cited s. 70 of the Evidence Act 1950 (hereafter "the EA") which states as follows:

> The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it is a document required by law to be attested.

[43] Section 70 of the EA deals with the admission of the party who executed an instrument, including one which is required in law to be attested. The admission of the party who executed the instrument is sufficient proof of his execution as against him, ie, his signature in the instrument. Section 70 of the EA is akin to an exemption to the requirement of s. 68 of the EA which states as follows:

> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

[44] Section 70 of the EA could be relevant in this case if the donor of the impugned PA could give evidence admitting that the signature in the impugned PA was his. Unfortunately, the donor has passed away. The second defendant, being the solicitor who executed the authentication form, could not claim that the donor had admitted to him that the signature in the impugned PA was his by relying on s. 70 of the EA.

[45] Only the person who executed the document could provide the admission, not the person who supposedly witnessed the execution of that person or other persons who were present. In *Sarkar Law of Evidence*, Malaysia edn, vol II, p. 1951, in relation to s. 70 of the EA, learned author states:

> Further, in *Arjun Sahu v. Kelai Rath* (1922) 2 Pat 317, the admission is binding only on the executant and not on other parties to the document nor their representatives in interest …

[46] The second defendant's counsel's submission relying on s. 70 of the EA is totally misplaced.

[47] The second defendant could not use the parties' agreement on the fact that Tan Sri Mohamed Jin signed the impugned PA on 9 October 2013 to his advantage to say that there was an admission of fact that the donor had admitted to him it was his signature, and hence, that would suffice to construe that the donor had executed the impugned PA before the second defendant. What is material is, it is an agreed fact that the late Tan Sri Mohamed Jin did not write his signature before or in front of the second defendant. That is the sole issue which is before this court for consideration.

[48] The second defendant's counsel has relied on the Federal Court case in *Chin Jhin Thien & Anor v. Chin Huat Yean & Anor* [2020] 7 CLJ 137; [2020] 4 MLRA 324 in his submission. This court is of the considered view that the reliance of the second defendant's counsel on this Federal Court decision is misplaced.

[49] In our present case, the pressing issue is the requirement of s. 3(1)(a)(vi) of the Act, ie, that the instrument has to be executed before the second defendant. Whereas, in *Chin Jhin Thien* (*supra*) the Federal Court focuses on giving effect to a testator of a will and not to deprive the testator the right to select the beneficiaries based on his wishes. The Federal Court's finding and decision are purely based on the peculiarity of the surrounding facts of that case; whereas, in our present case, it is purely a question of law on the interpretation of s. 3 of the Act.

Third Defendant's Submission

[50] In gist, the third defendant's counsel submitted that the fact that the second defendant requested the late Tan Sri Mohamed Jin to hold a pen and place a mark next to his signature which had been executed a day earlier, that gesture of the mark is sufficient to be construed as executed before the solicitor under the law.

[51] To surmise, the third defendant's counsel submitted as follows:

> 3.6 … it is humbly submitted that the combination of signature and subsequent mark on the PA made before advocates and solicitors, and admitted to be so made by the Deceased, should be accepted as that the PA was indeed executed before an advocate and solicitor. Alternative, the mark alone that was made by the Deceased on the impugned PA should humbly be accepted to be the valid signature of the Deceased executed before not one, but 2 advocates and solicitors, namely the 2nd defendant and En. Luqman. Therefore, it is humbly submitted that the PA was duly executed by the Deceased before advocates and solicitors in compliance with section 3(1)(a) of the PAA, 1949.

[52] In response to the third defendant's submission, this court accepts that the making of a mark could be accepted as signed by an executant or the signature of an executant under the law (see s. 3 of the Interpretation Acts 1948 and 1967, the definition of "sign" as cited by the counsel).

[53] However, on these peculiar facts before this court, it is the pre-signed signature not executed before the second defendant that is the subject of issue to be deliberated. It is not whether the subsequent marking is or is not valid as a signature. If this court was to accept the third defendant's counsel's submission, new issues would arise in respect of the authentication by the second defendant. Which signature, the pre-signed signature or the mark one, did the second defendant attempt to authenticate in his authentication form? According to the third defendant's counsel's submission, there are now two signatures on the impugned PA. The authentication form did not make clear which signature the certificate of authentication intended to certify. Technically, flowing from the third defendant's submission, the authentication form would be defective, as it did not state clearly which signature the second defendant was authenticating.

[54] If the argument is that the mark is part of the pre-signed signature, this argument would be flawed. It is impermissible to authenticate an executant's signature in part, but miss the earlier part for a gap of a day.

[55] The third defendant's counsel also submitted that the late Tan Sri Mohamed Jin admitted to the second defendant that the pre-signed signature was his signature, that fact could satisfy that the second defendant has personal knowledge or according to information given to him by a trustworthy and respectable person. This court could not accept this submission.

[56] First, the part that states "… to my personal knowledge …" in the authentication form is meant to refer to the preceding part of the sentence which refers to the fact that the signature is executed in the presence of the person authenticating it. In the instant case, the signature was not executed in the presence of the second defendant.

[57] The mere fact that the executant told the second defendant that the signature was his, that fact could not give raise to a personal knowledge *vis-à-vis* experience through eye-witness of the signing of the executant's signature. Hence, the second defendant could not have had personal knowledge of the executant's signature since the second defendant did not see the signing of the signature. If Parliament intended to allow "personal knowledge" to include an admission by the executant, it could have provided such alternate wording in the section or in the sample authentication form (Form I of the First Schedule) in the Act.

[58] Secondly, the part "… according to information given to him by a trustworthy and respectable person …" refers to information given by a third party, not the executant himself/herself. Further, as alluded in the earlier part of this judgment, this part of the wording is meant for the use where the power of attorney is executed outside Peninsular Malaysia.

[59] The third defendant's counsel submitted in para 4.4 of his submission that this court had made a ruling that there is no forgery of the impugned PA after the hearing of the evidence of PW1 and PW2.

[60] This court would like to put the record straight that the third defendant's counsel's submission is incorrect. This court did not make any ruling of the genuineness of the late Tan Sri Mohamed Jin's signature. It was the plaintiffs and the defendants who agreed not to pursue the issue of forgery or fraud of the signature in the impugned PA. It is also the plaintiffs who had abandoned this allegation of forgery or fraud with respect to the signature on the impugned PA.

A **Summation**

[61] Based on the above finding, this court is of the considered view that the purported instrument, ie, the impugned PA, which was intended to create the power of attorney therein had fallen short of complying with s. 3(1)(a)(vi) of the Act. This court, therefore, answers the question of law posed in the negative.

[62] Section 3(1) of the Act states clearly that "no instrument purporting to create a power of attorney … shall have any validity to create power within Peninsular Malaysia unless …". In view of the finding of this court that the executant of the impugned PA did not execute the instrument before the second defendant, therefore, the impugned PA could not have validly created such power stated therein. It then follows that the attorney did not have the powers stated in the impugned PA. The impugned PA is, therefore, an instrument which is invalid in law to enable the first defendant to act for the late Tan Sri Mohamed Jin.

[63] The transfer form which was executed by the first defendant as the holder of the invalid power of attorney could not constitute a valid instrument of transfer. The third defendant's interest as a registered proprietor could be defeated under s. 340(2)(b) of the National Land Code ("NLC") which states: "the title or interest of any such person or body shall not be indefeasible where registration was obtained by … or by means of an insufficient or void instrument".

[64] In *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, the Federal Court held, at para. 21, that 'immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis a vis* the title or interest'.

[65] In this present case, the third defendant is the holder of the immediate registered title or interest of the property, therefore, the proviso in s. 340(3) of the NLC, *vis-à-vis*, a purchaser in good faith, could not lend a hand to the third defendant to claim good title to the property. The proviso to the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. The third defendant did not fall under the category of a subsequent transferee. Hence, based on the Federal Court decision in *Tan Ying Hong* (*supra*), the transfer of the property to the third defendant is liable to be set aside because the registration was premised on an insufficient instrument in law, ie, the transfer form executed by an attorney who was appointed under an invalid PA.

Conclusion

[66] For the reasons stated above, this court allowed the plaintiffs' claims in so far as prayers 18(i), (ii), (iii), with modification, and prayer 18(iv) in the pernyataan tuntutan terpinda dan dipinda lagi. The order of these prayers shall equally apply to those prayers at para. 19 (against the second defendant) that have the same effect. This court further ordered costs of RM5,000 against the first defendant, costs of RM7,000 against the second defendant, and costs of RM5,000 against the third defendant (all costs are subjected to allocator fees) to be paid to the plaintiffs.